United Nations TD/B/C.I/CLP/L.9

United Nations Conference on Trade and Development

Distr.: Limited
25 May 2018

Original: English

Trade and Development Board
Trade and Development Commission
Intergovernmental Group of Experts on Competition Law and Policy
Seventeenth session
Geneva, 11–13 July 2018
Item 3 (d) of the provisional agenda
Review of chapters V and VI of the Model Law on Competition

Model Law on Competition (2018): Revised chapter V*

* This is a revision of document TD/RBP/CONF.7/L.5.

GE.18-08442(E)
1808442

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Model Law on Competition (2018): Revised chapter V

Notification

I. Notification by enterprises

1. When practices fall within the scope of articles 3 and 4 and are not prohibited outright, and hence the possibility exists for their authorization, enterprises could be required to notify the practices to the administering authority, providing full details as requested.

2. Notification could be made to the administering authority by all the parties concerned, or by one or more of the parties acting on behalf of the others, or by any persons properly authorized to act on their behalf.

3. It could be possible for a single agreement to be notified where an enterprise or person is party to restrictive agreements on the same terms with a number of different parties, provided that particulars are also given of all parties, or intended parties, to such agreements.

4. Notification could be made to the administering authority where any agreement, arrangement or situation notified under the provisions of the law has been subject to change either in respect of its terms or in respect of the parties or has been terminated (otherwise than by effluxion of time), or has been abandoned or if there has been a substantial change in the situation (within (...) days/months of the event) (immediately).

5. Enterprises could be allowed to seek authorization for agreements or arrangements falling within the scope of articles 3 and 4, and existing on the date of the coming into force of the law, with the provision that they be notified within (...) days/months) of such date.

6. The coming into force of agreements notified could depend upon the granting of authorization, or upon expiry of the time period set for such authorization, or provisionally upon notification.

7. All agreements or arrangements not notified could be made subject to the full sanctions of the law, rather than mere revision, if later discovered and deemed illegal.

II. Action by the administering authority

1. Decision by the administering authority (within (...) days/months of the receipt of full notification of all details), whether authorization is to be denied, granted or granted subject where appropriate to the fulfilment of conditions and obligations.

2. Periodical review procedure for authorizations granted every (...) months/years, with the possibility of extension, suspension or the subjecting of an extension to the fulfilment of conditions and obligations.

3. The possibility of withdrawing an authorization could be provided, for instance, if it comes to the attention of the administering authority that:

(a) The circumstances justifying the granting of the authorization have ceased to exist;

(b) The enterprises have failed to meet the conditions and obligations stipulated for the granting of the authorization;

(c) Information provided in seeking the authorization was false or misleading.

I. Introduction

1. Chapter V on notification discusses the notification of agreements and not notifications of mergers and acquisitions. For the consideration of notifications in the context of mergers and acquisitions, see chapter VI of the Model Law on Competition.

2. A system of notification is one in which a competition authority engages in ex ante supervision, analysis and subsequent validation or authorization by granting clearance or exemptions to individual agreements that are notified to it. As opposed to a system where the parties to potentially anti-competitive agreements must undertake a self-assessment and bear the risk of wrongly assessing the agreement in question, the notification system transfers this responsibility to the competition authority. If parties to an agreement believe that their agreements could be in contravention of any of the purposive clauses of the country's competition law, they may file a notification form with the competition authority. This form is typically designed by the competition authority to collect information about the subject matter of the agreement, the section of the law that is thought to be contravened, the relevant market, the competitors to the parties to the agreement, the largest customers affected by the transaction and the facts relied on in granting an exemption. This information should enable the authority to conduct a competition law analysis of the likely competitive effects of the transaction on the identified relevant market and whether there is cause to grant authorization or exemption as the case may warrant.

3. The Model Law lays out the standard purposive clauses used in a notification regime and these clauses can be incorporated in primary legislation on restrictive trade practices or in competition law, as well as in subsidiary regulation.

4. A good example of a notification regime and typical procedures used under such a regime is the former enforcement regime in the European Union, put in place through Regulation No. 17 of 21 February 1962.[1] Under this regime, parties to agreements that possibly fell under the prohibitions on anti-competitive agreements could find that their agreement was void and unenforceable in a court of law if the agreement had not been notified to the European Commission and subsequently granted exemption or clearance. This was the case even if the agreement would have warranted exemption in the event of notification. Only notification of an agreement to the European Commission created the possibility of an exemption. Therefore, parties to an agreement could not enforce it in a national court during the period between the agreement's coming into force and the time of its notification. Thus, if parties wished their agreements to have the force of law, they had to file a notification, which led to a large number of notifications being filed with the European Commission.[2]

5. In order to deal with the administrative backlog created by the number of notifications filed, the European Commission devised a system whereby filed notifications that could not be given full treatment were provided a preliminary assessment, through modernization of the enforcement regime, as contained in Regulation No. 1/2003. According to this new system, no prior authorization is required with regard to agreements, decisions or concerted practices potentially covered by article 101(1) of the Treaty on the Functioning of the European Union. Instead, following a preliminary assessment, one of two outcomes is possible, namely the issuance by the European Commission of a comfort letter or a letter of administration, neither of which is binding in a court of law. A comfort letter issues a statement that an agreement does not violate the prohibition of anti-competitive agreements (negative clearance letter) or that an exemption is warranted for the agreement. The latter type of letter issues only a preliminary finding and not an exemption

[1] This regime was replaced through Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty.

[2] B Sufrin and A Jones, 2004, *European Commission Competition Law*, second edition (Oxford University Press, Oxford). Within a few months of the coming into force of the system, 37,000 notifications were filed, and only five decisions had been taken by the European Commission by 1968, seven years after the regulation had come into effect (L Warlouzet, Historical institutionalism and competition policy: The Regulation 17/62 (1962–2002)).

and therefore means that the agreement is void and unenforceable because the Treaty on the Functioning of the European Union states that an agreement is void unless exempted or that a block exemption or European Commission notice applies to the agreement. If the European Commission concludes in its preliminary assessment that an agreement is likely to produce anti-competitive effects and does not merit an exemption, it issues a letter of administration if it has opted not to pursue a formal decision.

6. The former notification regime of the European Union and its modernization illustrate some of the advantages and disadvantages of a notification regime (table V.1). The modernized regime is an example of a transformation from the ex ante control of anti-competitive agreements to ex post control. Reducing administrative costs is often considered the primary advantage of and incentive for such a reform, yet other factors need to be taken into account in any attempt to reform a notification regime, especially by young competition authorities.

7. A notification regime provides a competition authority with more information about potential anti-competitive practices in its jurisdiction, since enterprises are required to disclose the existence and contents of their agreements or arrangements. However, in an ex post control regime, a competition authority often has to conduct investigations on its own initiative with regard to potential restrictive practices, based on limited information on their likely effects. The disclosure of information in an ex ante control regime would not apply to hard-core cartels yet may be useful in evaluating other types of potentially restrictive practices such as vertical agreements. However, ex post control may increase the risk of non-compliance by enterprises since, under such a system, they do not need authorization from competition authorities but rely on their own assessments of the impacts of their practices.

8. In addition, a notification regime produces more deterrent effects on anti-competitive practices than ex post control. A notification regime encapsulates a preventive policy to stop harmful agreements at an early stage, while ex post controls analyse agreements only after they have been signed and implemented. The best way to balance false negative errors and false positive errors is to pursue accurate investigations and make well-informed competition enforcement decisions. It is recognized that, only if market signals are accurate and competition authorities have improved their knowledge and experiences and the quality of their decisions, can ex post control be more efficient than a notification system, given the administrative, information-related and incentive costs.[3]

Table V.1
Notification regimes: Overview of advantages and disadvantages

Advantages	*Disadvantages*
• Helps young competition authorities during institutional building phase to gather relevant information and build useful and resourceful databases, with continuous flows of information to the authority. • Filing of notifications often brings to the attention of competition authorities horizontal agreements that are anti-competitive and that would otherwise not necessarily have been revealed owing to the similar interests of parties. • Builds legal certainty in an environment where the competition law is new in the legal framework and local jurists have little knowledge about the principles underpinning the law.	• Can place a heavy burden on a competition authority's resources and therefore prove counterproductive if insufficient resources remain available to deal with other matters, in particular if pernicious offenses cannot be properly investigated and prohibited. • If many filings are made with the authority, it is difficult to give adequate consideration to each agreement.

[3] RJ Van den Bergh, 2017, *Comparative Competition Law and Economics* (Edward Elgar Publishing, Camberley, United Kingdom of Great Britain and Northern Ireland).

- Helps establish a competition culture at a time when competition law concepts are still little known.

II. Commentaries on chapter V and alternative approaches in existing legislation

A. Alternative approaches in existing legislation: Notification regimes

9. Some examples of alternative approaches in existing legislation are shown in table V.2.

Table V.2
Alternative approaches in existing legislation: Notification regimes

Australia	According to part VII of the Competition and Consumer Act (2010) on authorizations, notifications and clearances in respect of restrictive trade practices, the Competition and Consumer Commission may, upon application by or on behalf of parties, grant an authorization to the parties concerning restrictive trade practices. According to the Guidelines for Authorization of Conduct (non-merger, 2017), if parties obtain authorization from the Commission for conduct that falls under part IV of the Act on restrictive trade practices, they receive statutory protection from legal action under the Act for that conduct. Any authorization granted by the Commission must specify the provisions of the Act that will not apply to the specified conduct while the authorization is in force. Applicants may obtain legal advice on whether the proposed conduct might breach the Act and whether they should consider applying for authorization. Division 1 of part VII of the Act details how the Commission grants authorizations, procedures for applications, the determination of applications for authorizations and revocations, among other items. Collective bargaining provisions are detailed in part VII, division 2, subdivision B.
Common Market for Eastern and Southern Africa	According to the Competition Regulations and rule 57 of the Competition Rules, the Competition Commission may, upon application by or on behalf of an undertaking, grant an authorization to the undertaking to make a contract or arrangement or to give effect to a provision thereof, which might be anti-competitive or might have the effect of substantially lessening competition within the Common Market. In this case, articles 16 and 18 of the Competition Rules shall not prevent the undertaking from making the contract or arrangement or arriving at an understanding in accordance with the terms of the authorization granted by the Commission and giving effect to any provision of the contract or arrangement so made. The Commission may also grant interim authorization pending full consideration of the matter of an application.
Italy	Section 4 of the Competition and Fair Trading Act (1990) provides that the Antitrust Authority may authorize, for a limited period, agreements or categories of agreements prohibited under section 2, which have the effect of improving the conditions of supply on the market, leading to substantial benefits for consumers. Such improvements shall be identified taking into account the need to guarantee to the undertakings the necessary level of international competitiveness and shall be related, in particular, to increases in production, improvements in the quality of production or distribution or to technical and technological progress. The exemption may not allow restrictions that are not strictly necessary to achieve the specified goals and may not permit competition to be eliminated in a substantial part of the market. The Authority may, after giving notice, revoke an exemption in cases where the party concerned abuses it or when any of the conditions on which the exemption was based no longer hold.

Following the entry into force of Regulation No. 1/2003 of 16 December 2002, the Authority may not assess the merits of prior notifications submitted by undertakings if European Community-level agreements are involved.

Albania — Article 49 of the Law on Competition Protection (No. 9121) provides that the Competition Authority has exclusive competence to decide upon notifications of agreements for granting individual exemptions. Provided that the conditions under article 5 of the Act are satisfied, an individual exemption may be granted by the Authority. The exemption enters into force on the date of notification.

Singapore — According to section 34 of the Competition Act (2006) and the Guidelines on filing notifications for guidance or decision with respect to the section 34 prohibition and the section 47 prohibition (2016), an undertaking may apply to the Competition Commission for the following:

(a) Guidance as to whether, in the view of the Commission:

(i) An agreement (note that section 34 (4) of the Act extends the term "agreement", with the necessary modifications, to encompass a decision by an association of undertakings as well as a concerted practice) to which the undertaking is a party is likely to infringe the section 34 prohibition or whether the agreement is likely to fall under a block exemption (section 43 of the Act) or is excluded; and/or

(ii) Whether conduct by the undertaking is likely to infringe the section 47 prohibition (section 50 of the Act); or

(b) A decision as to whether:

(i) The agreement has infringed the section 34 prohibition (section 44 of the Act); and/or

(ii) The conduct has infringed the section 47 prohibition (section 51 of the Act).

Notification of an agreement to the Commission by an undertaking provides immunity from financial penalty with regard to infringements by that agreement of the section 34 prohibition, which occurr during the period beginning from the date on which the notification was made to such date as may be specified in a notice given by the Commission following its determination of the notification. This date cannot be earlier than the date of the notice.

Turkey — The notification obligation has been removed through amendment of the Act on the Protection of Competition (No. 4054). However, a negative clearance application or a notification for an exemption may be filed with the Competition Authority (article 8). Under article 12, a notification may either be filed jointly or by one of the parties. If any one of the parties files a notification, it is mandatory for the notifying party to inform the other party concerned. If a decision of an association of undertakings is in question, the association shall notify the Authority.

According to article 8, the Competition Board may, on the basis of information at hand, grant a negative clearance certificate indicating that an agreement, decision, practice or merger and acquisition are not contrary to articles 4, 6 and 7 of the Competition Act. After issuing such a certificate, the Board may revoke its opinion at any time, under the conditions set out in article 13. However, in this case, criminal sanction is not applicable to the parties for the period until the change of opinion by the Board.

B. Information to be provided on the notification form

10. A competition authority can request as much information as it needs to understand how an agreement will impact on competition and whether there are any redeemable features of the agreement or practice warranting an exemption. Therefore, in seeking authorizations, enterprises would be required, under a notification regime, to notify the full

details of the intended practice or agreement to the administering authority. The particulars to be notified may depend on the circumstances and are unlikely to be the same in every instance. The information required may include, inter alia, the following:

(a) The name(s) and registered address(es) of the party or parties concerned;

(b) The names and addresses of the directors and of the owner or part owners;

(c) The names and addresses of the major shareholders, with details of their holdings;

(d) The names of any parent and interconnected enterprises;

(e) A description of the products or services concerned;

(f) The places of business of the enterprise(s), the nature of the business at each place and the territory or territories covered by the activities of the enterprise(s);

(g) Further information on the relevant market and the competitors of the party or parties;

(h) The date of commencement of any agreement;

(i) The duration of any agreement or, if it is terminable by notice, the period of notice required;

(j) The complete terms of the agreement, whether in writing or oral, in which oral terms would in addition be provided in writing.

11. It is important to note that the information provided on a notification form may become public and lawmakers should therefore devise a system to protect the confidential information submitted in a notification. For example, the Competition Commission of South Africa provides a form in which an applicant for an exemption can identify the information submitted with the application that is confidential.

12. In seeking authorization, it is often the responsibility of the notifying parties to demonstrate that the intended agreement will not have effects proscribed by the law or that it is not in contradiction with the objectives of the law.

C. Alternative approaches in existing legislation: Review standards and exemptions

13. Some examples of alternative approaches in existing legislation are shown in table V.3.

Table V.3
Alternative approaches in existing legislation: Review standards and exemptions

Australia	Under the Competition and Consumer Act (2010), part VII, division 1, section 90, states that the legal test that the Competition and Consumer Commission applies when considering an application for authorization depends on the conduct being engaged in. The Commission may grant an authorization for conduct that will or may breach per se provisions of the Act, such as cartel-like conduct, secondary boycott and resale price maintenance provisions, only if it is satisfied that in all circumstances, the proposed conduct will result, or be likely to result, in a benefit to the public, and that benefit will outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or the proposed understanding arrived at; and the provision was given effect (section 90 (5A)). Furthermore, the Commission will not make a determination granting an authorization under section 88 in relation to conduct, "unless it is satisfied in all the circumstances: (a) that the conduct would not have the effect, or would not be likely

to have the effect, of substantially lessening competition; or

(b) that:

(i) the conduct would result, or be likely to result, in a benefit to the public; and

(ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct".[4]

Singapore — A number of exemptions and exclusions apply with regard to agreements. For example, in the third schedule of the Competition Act (2004), an agreement that prevents, restricts or distorts competition, in contravention of section 34, is excluded from the application of section 34 as follows:

(a) If the agreement was made to comply with a requirement imposed by a written law (section 2 (1));

(b) To avoid conflicts with the international obligations of Singapore (section 3);

(c) If the minister is satisfied that there are exceptional and compelling reasons of public policy warranting non-application of section 34 to an agreement (section 4); or

(d) If the agreement relates to goods or services to the extent that another written law relating to competition gives another regulatory authority jurisdiction over the matter (section 5).

In addition, section 34 does not apply to agreements that contribute to improving production or distribution or that promote technical or economic progress. Further, an exemption may be granted for an agreement that contravenes section 34 if a block exemption is likely to apply. No exemptions can be sought for an agreement made by an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance of the particular tasks assigned to that undertaking (section 1, third schedule).

South Africa — Section 10 of the Competition Act (1998) allows for the granting of an exemption for an agreement or practice that constitutes a prohibited practice under chapter 2, which addresses restrictive horizontal and vertical practices and the abuse of dominance. To qualify for an exemption, an agreement or practice must be found to:

(a) Contribute to the promotion or maintenance of exports;

(b) Promote the competitiveness of small businesses or firms controlled or owned by historically disadvantaged persons;

(c) Change productive capacity to stop decline in an industry;

(d) Maintain economic stability in an industry designated by the minister.

D. Commentaries

14. Paragraph 1.1 of chapter V of the Model Law on Competition creates room for a broad and encompassing notification regime. The provision refers to both possible anti-competitive agreements falling under the scope of chapter III and unilateral behaviour covered by the prohibition in chapter IV of the abuse of a dominant position. Lawmakers may employ such a broad notification or exemption system, yet it is rare for a notification system to be used for abuse of dominance-type conduct. Where a highly concentrated sector of industry requires specific oversight and ex ante intervention in order to safeguard competition, sectoral regulation appears to be the more frequently used tool. Accordingly, incumbent companies in a regulated industry are often subject to specific notification requirements outside the application of a general competition law regime.

[4] See http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/caca2010265/s90.html.

15. Furthermore, as previously mentioned, a broadly worded notification regime can also lead to large numbers of notifications. New competition authorities should not underestimate the pressure posed by a notification regime on their resources. Competition authorities can become quickly paralyzed by large numbers of notifications. A new competition law regime would be well advised to use drafting language that can properly classify the types of agreements that are to be notified.

16. One approach to wording a notification or exemption provision is to require notification for only certain types of agreements, such as potentially anti-competitive horizontal agreements and agreements that exceed a certain threshold, for example, where the combined market share of the notifying parties indicates that together they have substantial market power, which necessitates the scrutiny of any agreement between them.

17. Paragraph I.2 deals with the question of who should be entitled to notify of an agreement.

18. Paragraph I.3 concerns situations in which a company enters into a number of parallel agreements with different parties. For the purpose of procedural efficiency, the provision suggests that it should be possible to notify of only one of the parallel agreements, provided that their terms are the same and that information as to the identity of all contracting parties is provided to the competition authority.

19. The provision provided for in paragraph I.4 becomes relevant when an authorization granted by a competition authority is not limited in time. If circumstances that were relevant during the initial competition law assessment and authorization later change, then it may be prudent for the competition law regime to order notifications of such changes and thereby allow the competition authority to reassess the agreement in the light of the new circumstances.

20. Paragraph I.5 addresses situations in which potentially anti-competitive agreements have been concluded and executed prior to the entry into force of the competition law. By obliging the parties to also notify pre-existing agreements to the competition authority, it allows the authority to exercise its control function and ensure compliance with the new competition law.

21. From the perspective of the notifying parties, obtaining provisional authorization upon notification and being able to implement the agreement immediately may be the preferred option. However, such provisional authorization entails severe consequences with regard to restitution and liability if the competition authority does not grant an authorization after having carried out its assessment. From the perspective of legal certainty, requiring that the entry into force of an agreement depend on its authorization may be the best solution. However, if its workload does not allow the competition authority to assess all notifications in a timely fashion, this option may lead to significant delays, which may have an impact on the economic significance of an agreement.

22. Against this background, the third option set out in paragraph I.6 takes on board considerations of procedural efficiency whereby, if a reasonable assessment period set by the law expires, an agreement is deemed authorized. This option enables competition authorities to exercise their control functions and scrutinize agreements that raise severe competition concerns, while providing the notifying parties with a time frame for their planning.

23. Paragraph I.7 deals with the consequences of non-compliance with the notification obligation. The provision suggests that non-compliance should be subject to the full sanctions of the law, which may entail the automatic nullity of an agreement and the imposition of fines, even if the agreement would qualify for an exemption upon notification. Taking into account the principle of proportionality, it may therefore also be well justified that a competition law may limit the sanction for a failure to notify to the imposition of a procedural fine and reserve other sanctions for agreements that prove to be anti-competitive based on an assessment by the competition authority.

24. Paragraph II addresses the possible actions of a competition authority under a notification regime. With regard to paragraph II.1, it should be noted that setting a time limit for the review of an agreement is a typical feature of a notification regime. It is often combined with the presumption that an authorization is deemed granted if the review period

expires without action by the competition authority. While a stated time limit should be incorporated in the legislation, it is important to note that assessing the competitive effects of an agreement takes time and is generally difficult and may require the review and assessment of information that goes beyond that provided on a notification form. Some competition law regimes therefore allow the authority to extend the review period if the complexity of the matter requires additional time. In this context, the issuance of a provisional validity or temporary immunity during the course of the assessment period also becomes useful.

25. Given that the relevant circumstances for an authorization, in particular the structure of the relevant market affected by the agreement, may change over time, it may be prudent for a competition law regime to require the periodic revision of authorizations, if these authorizations are granted for an indefinite or extended period. If the competition authority limits authorizations in time, such revision may not be necessary, since the notifying parties will have to resubmit a notification upon expiry of the authorization.

26. Finally, an authorization may be withdrawn in the instances listed in paragraph II.3 (c).